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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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PITTSTON COAL GROUP, ET AL., PETITIONERS

*v.*

JAMES SEBBEN, ET AL.

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ANN MCLAUGHLIN, SECRETARY
OF LABOR, ET AL., PETITIONERS

*v.*

JAMES SEBBEN, ET AL.

---

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

*v.*

CHARLIE BROYLES, ET AL.

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*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURTS OF APPEALS*
*FOR THE FOURTH AND EIGHTH CIRCUITS*

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## REPLY BRIEF FOR THE FEDERAL PETITIONERS

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:



Statutes and regulation:

# In the Supreme Court of the United States

OCTOBER TERM, 1988

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No. 87-821

PITTSTON COAL GROUP, ET AL., PETITIONERS

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No. 87-827

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS*

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## REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. The primary issue before the Court is whether the Department of Labor's interim regulation applicable to claims filed before 1980, 20 C.F.R. 727.203, is consistent with the statutory commandment of Section 402(f)(2) of

the Black Lung Benefits Act of 1972, 30 U.S.C. 902(f)(2), that the regulation's "criteria * * * not be more restrictive" than those applied under HEW's interim regulation, 20 C.F.R. 410.490, which governed claims filed before July 1, 1973. Both the Labor and HEW interim regulations provide for a rebuttable presumption procedure by which claimants may be found entitled to benefits without direct proof of all of the statutorily required elements of 1) total disability; 2) caused by pneumoconiosis; 3) arising out of coal mine employment. *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5. The courts below have ruled, incorrectly we submit, that the conditions for invoking the rebuttable presumption under the Labor regulation impermissibly result in more restrictive "criteria" than the HEW regulations. Specifically, under the HEW regulation some claimants who offer proof of pneumoconiosis but have fewer than ten years of coal mine experience may trigger the presumption by otherwise proving that coal mine employment was the cause of their disease, while under the Labor regulation no such alternative proof of causation may be offered by claimants with fewer than ten years of coal mine employment in order to trigger the presumption.

We argued in our opening brief that this difference in the method of proving coal mine causation in order to trigger the rebuttable presumption of entitlement to benefits is not a more restrictive criteria as that term is used in Section 402(f)(2). Section 402 defines various terms used in the statute, and Section 402(f)(2), which bars the use of more restrictive criteria, is part of the definition of "total disability." The criteria referred to thus bear on the issue of whether a person is totally disabled, not on the statutory requirement relating to coal mine causation of that disability. In our view, therefore, Congress in Section



402(f)(2) was referring to medical criteria relating to whether a claimant is totally disabled, not to HEW's evidentiary and adjudicatory rules, including its allowance of evidence other than duration of employment in order to prove coal mine causation.

The Sebben respondents contend in response that "total disability" is actually a "term of art" (Br. 23) embodying the three elements of entitlement to black lung benefits—total disability, pneumoconiosis, and coal mine causation. See also Broyles Br. 20 n.22. They rely on Section 402(f)(1)(A), 30 U.S.C. 902(f)(1)(A), also part of the definition of "total disability," which provides that "a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged." They also rely upon the definition of "pneumoconiosis" (§ 402(b), 30 U.S.C. 902(b)), which provides that it is a pulmonary disease caused by coal mine employment. Read together, they suggest, these provisions lead to the conclusion that "total disability" is the statute's way of referring to the ultimate question of entitlement to benefits, and the reference to "criteria" embodies any evidence bearing on that issue.

The *Sebben* respondents' construction of "total disability" to include not only the fact of disability, but also the disabling disease—pneumoconiosis—and its coal mine causation, is at best an awkward and counterintuitive use of language. Ordinarily, whether a person is totally disabled is considered a question distinct from what caused his disability. See *Black's Law Dictionary* 1336 (5th ed. 1979). Also, as the Sebben respondents concede (Br. 23 n.38), their construction is not supported by what would be several redundant references in the Act (see, *e.g.*, 30 U.S.C.

901(a), 922(a)(1) and (3)) to miners who are totally disabled "due to pneumoconiosis."

In addition, nothing in the history of the enactment of Section 402(f)(1)(A)—which contains the only reference to pneumoconiosis within the definition of total disability—suggests that Congress had a purpose to bundle the whole question of entitlement to benefits into the term "total disability." That section, which was added to the statute in 1972, had the distinct purpose to modify HEW's prior determination that a miner had to show inability to do *any* gainful work to be considered totally disabled, not to turn it into a term of art. See Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 4(a), 86 Stat. 153; S. Rep. 92-743, 92d Cong., 2d Sess. 16-17 (1972). Absent some clear indication of a further purpose to convert the definition of "total disability" into a term of art incorporating all the elements of a claim, "total disability" should be construed in light of its ordinary meaning. See *Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 164 (1985).

The Broyles respondents assert (Br. 39) that even if the "criteria" referred to in Section 402(f)(2) are medical criteria, the cause of a miner's disability is often a question best answered by a physician, so that the causation element of HEW's interim regulation is included in the criteria preserved by Section 402(f)(2). But that argument relies on the same counterintuitive concept of "total disability." What causes a miner's pneumoconiosis is a distinct question from whether the claimant is totally disabled. Notwithstanding that a physician's opinion may be relevant to the causation question, that opinion will rest on a distinct body of evidence and relate to a separate issue. The fact that medical expertise may be relevant on the question of causation does not suggest that the criteria used to define total disability include those used to deter-



mine causation.[1]

Both respondents concede (Sebben Br. 34-36; Broyles Br. 18 n.20) that Labor's interim regulation is not defective on the ground that it incorporates methods of rebutting the presumption of entitlement to benefits which were not expressly set forth in HEW's interim regulation.[2] In so doing, they have conceded that "criteria" does not include all the evidentiary and adjudicatory rules in HEW's interim regulation. Indeed, their concession applies to the most important adjudicatory rule because, as the Broyles respondents admit (Br. 24 n.24), whether a claimant obtains benefits "is ultimately determined using the various re buttal methods." [3] Respondents thus urge that "criteria" in

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[1] The Broyles respondents also argue (Br. 25) that Congress intended "criteria" in Section 402(f)(2) to mean more than medical criteria relating to total disability because in Section 402(f)(1)(C), 30 U.S.C. 902(f)(1)(C), Congress required the use of "criteria" no more restrictive than those used by HEW in social security disability determinations, and vocational as well as medical criteria are both used in making social security determinations. The argument is without merit, however. Vocational and medical criteria are both relevant in determining whether a claimant is totally disabled. Causation is a distinct issue apart from the fact of total disability, and the manner in which it may be proved does not alter the criteria governing the existence of the disability in the first place.

[2] HEW's interim regulation provides for rebuttal by showing that the individual is doing coal mine work or comparable work or is able to do so. Labor's interim regulation allows rebuttal on these grounds, and also expressly authorizes rebuttal by showing that the miner's disability "did not arise in whole or in part out of coal mine employment" and that "the miner does not * * * have pneumoconiosis" (20 C.F.R. 727.203(b)(3) and (4)).

[3] The Sebben respondents similarly recognize (Br. 46) that the differences between the rebuttal provisions of the interim regulations are much more important, in practice, than the difference in the methods of invoking the presumptions. As they state, the predictions by the private petitioners (Br. 3 & n.7) and amicus National Council on Com-

Section 402(f)(2) refers to the adjudicatory and evidentiary rules employed by HEW in connection with invocation of the presumption, but not those relating to rebuttal of the presumption. Nothing in the language of the provision or its legislative history offers any basis for such a peculiar construction of the statute. Our interpretation, in contrast, is closely tied to both the language of Section 402(f)(2) and its legislative history, which show that Congress intended to require Labor to use HEW's medical criteria, particularly the ventilatory study scores in its interim regulation, in determining total disability, until it devised new "medical tests * * * which accurately reflect total disability in coal miners" (§ 402(f)(1)(D), 30 U.S.C. 902(f)(1)(D)).

In arguing that Labor was confined by HEW's approach to invoking the presumption, but not by its approach to rebuttal, the Sebben respondents rely explicitly on the Conference Report for the proposition that Congress clearly intended to require the use of the additional rebuttal methods recognized by Labor. That Report, they correctly note, clearly "mandat[ed] that 'in determining claims under [the interim] criteria all relevant medical evidence shall be considered in accordance with the standards prescribed by the Secretary of Labor.' " Br. 35 (quoting H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978)); see also Broyles Br. 18 n.20. In so acknowledging, however, they ignore the very next sentence of the Conference Report, stating that "all standards are to incorporate the presumptions contained in section 411(c) of the Act." Section 411(c)(1), 30 U.S.C. 921(c)(1), states that it should be presumed that "pneumoconiosis arose out of such employment" in cases involving claimants who worked for ten years as a coal miner. Congress thus attached great significance to the presumption of causation based on ten years of coal mine employment. In contrast, respondents have pointed to no evidence whatsoever that Congress intended that miners with fewer than ten years of coal mine experience should be allowed to establish a presumption of entitlement to benefits if they presented X-ray evidence showing pneumoconiosis.

The medical evidence underlying Congress's mandate that "all standards" incorporate the ten-year presumption contained in Section 411(c)(1) showed that miners were unlikely to have contracted disabling pneumoconiosis in that period of time, as we stated in our opening brief (at 23-24). In complaining (Sebben Br. 32) that we cited only one medical reference, respondents failed to note that the medical report we cited was appended to a 1977 congressional report, and hence is the most relevant study indicating what Congress understood at the time it enacted Section 402(f)(2), and that it summarized the evidence in a manner highly favorable to claimants.[4] As respondents

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pensation Insurance, et al. (Br. 9 & n.9) that a large number of claims that would be denied under Labor's interim regulation would be granted under HEW's interim regulation were based on the assumption that the additional methods of rebutting the presumption available under Labor's regulation would not be available if the respondents prevail here. If the additional rebuttal methods are available in any event and relevant evidence can be obtained, then it would seem that, as we suggested in our petition (at 12) in No. 87-827, the massive reopening ordered by the Eighth Circuit, while creating a substantial administrative burden, may change the result in relatively few cases.

[4] The medical reference was appended to the House Report in support of the provision in its bill that would have provided black lung benefits to all persons who worked for 30 years in coal mines (see H.R. Rep. 95-151, 95th Cong., 1st Sess. 5 (1977)). That provision, which was opposed by many members of the House committee (see *id.* at 80-84) and was not adopted by the Senate, was not enacted.

stated, the studies summarized in the medical report showed that miners with fewer than ten years' experience in coal mines may contract pneumoconiosis. However, "pneumoconiosis is customarily classified as 'simple' or 'complicated[,]' " and "[s]imple pneumoconiosis * * * is generally regarded by physicians as seldom productive of significant respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Congress plainly recognized in enacting the Black Lung Benefits Act that pneumoconiosis is not necessarily disabling, since, as Section 401(a) states, the purpose of the Act is to provide benefits to miners "totally disabled due to pneumoconiosis," not just to miners who contracted pneumoconiosis. Respondents failed to note that the studies summarized in the medical report appended to the House report showed that almost all cases of *disabling* pneumoconiosis occurred in miners with substantially more than ten years' experience.[5] In fact, the medical report suggested that paying miners benefits after 15 years of experience would "be good preventive medicine" since it would remove them from coal mines before they developed a disabling form of

[5] One of the studies summarized in the medical report showed that of 104 miners with more than 30 years of coal mine experience, 47 showed X-ray evidence of complicated pneumoconiosis or advanced simple pneumoconiosis, while none of the 35 miners with fewer than ten years of experience had complicated pneumoconiosis (H.R. Rep. 95-151, *supra*, at 34). Indeed, only two of the 35 miners with fewer than ten years' experience showed any evidence of pneumoconiosis (*ibid.*). Another study summarized in the medical report, which both respondents cited (Sebben Br. 32; Broyles Br. 40), showed a higher incidence of pneumoconiosis based on autopsy evidence. However, as the bar graph summarizing the autopsy study shows, complicated pneumoconiosis, as well as "severe" cases of simple pneumoconiosis, while common among miners with extensive experience, was uncommon among miners with fewer than ten years' experience (H.R. Rep. 95-151, *supra*, at 34).



the disease. H.R. Rep. 95-151, 95th Cong., 1st Sess. 33 (1977). In light of that evidence, it is implausible that Congress would have required Labor to presume that miners with X-ray evidence of simple pneumoconiosis but fewer than ten years of coal mine experience are entitled to benefits.[6]

Both respondents (Sebben Br. 36-37; Broyles Br. 41-42) contend that the Secretary's interpretation of Section 402(f)(2) is not entitled to deference because it is a post hoc rationalization that was not made contemporaneously with the implementation of the statute. There is no basis for that contention. Labor's interim regulation was finally promulgated on August 18, 1978, less than six months after the 1978 amendments took effect, and the first sentence of the regulation has always required that a claimant show that he "engaged in coal mine employment for at least 10 years" in order to invoke the presumption (20 C.F.R. 727.203(a)). The Secretary's interpretation is plainly a contemporaneous construction of Section 402(f)(2) that is entitled to deference.

[6] Labor, like HEW (see 20 C.F.R. 410.416(b)), has recognized that miners with fewer than ten years' experience may contract pneumoconiosis (see 20 C.F.R. 718.203(c)). Broyles, who had five years of coal mine experience and 20 years of experience in other dusty occupations, was "given the benefit of the doubt" that his pneumoconiosis was caused by coal mine employment (87-1095 Pet. App. 15a-16a). The Sebben respondents thus err in stating that "a person with 9.5 years of exposure * * * is barred from even attempting to prove that this condition was caused by mine employment" (Br. 29). Such claimants are barred only from establishing a presumption that they are entitled to benefits. And, while it would normally be the case that pneumoconiosis resulting from limited coal mine experience would not be disabling, nothing in the regulations prevents miners with fewer than ten years of experience from showing that they are totally disabled due to pneumoconiosis and hence entitled to benefits; again, they simply may not invoke a presumption of entitlement.

2. The Sebben respondents argue that the Eighth Circuit correctly ordered the Secretary to reopen all Part C claims arguably denied by virtue of the alleged defect in Labor's interim regulation. They rely on Congress's 1978 enactment of Section 435(b), 30 U.S.C. 945(b), directing the Secretary to review each claim denied prior to or pending on March 1, 1978, taking into account the provisions of the Black Lung Benefits Reform Act of 1977, including the "no more restrictive criteria" requirement of Section 402(f)(2).[7]

As an initial matter, it should be noted that it is undisputed that the Secretary reopened the Part C claims that had been denied and reconsidered them, along with unresolved, pending claims, under Labor's interim regulation. Thus, their claims were "automatically" reviewed in light of the 1978 amendments. And, as the evidence cited by the Sebben respondents shows (Br. 8 & n.21), review under Labor's interim regulation had a major impact, since the approval rate of Part C claims more than quadrupled (from less than 10% to 45%) under Labor's interim regulation. Claimants with fewer than ten years of coal mine employment benefited from the Secretary's review following the 1978 amendments since an expanded definition of pneumoconiosis (30 U.S.C. 902(b); 20

[7] The Sebben respondents admit (Br. 45 n.85) that the right to "automatic" review did not extend to two of the subclasses of their putative class. Those miners whose claims were denied under the Part B program had to request review in light of the 1978 amendments, and therefore had no right to automatic review. See 30 U.S.C. 945(a); 20 C.F.R. 410.704(d). Those miners who filed claims after the effective date of the 1978 amendments but before April 1, 1980, also had no right under Section 435(b) to automatic review of their files in light of the 1978 amendments, since they had not filed claims prior to the 1978 amendments. The Sebben respondents have provided no basis for reopening the claims of members of these subclasses.



C.F.R. 727.202, 718.201), a prohibition against re-reading certain X-rays (30 U.S.C. 923(b)), and worker's compensation principles of causation (S. Rep. 95-209, 95th Cong., 1st Sess. 13-14 (1977)) applied to their claims as a result of the amendments. In addition, the 1978 amendments gave them a right to a complete pulmonary examination at the expense of the Black Lung Disability Trust Fund. 30 U.S.C 923(b); 20 C.F.R. 725.406(c). In short, there is no basis for respondents' claim (Sebben Br. 40) that "the Secretary went through [a] largely meaningless exercise" in considering their claims in light of the 1978 amendments.

The members of the putative class contend only that Labor's interim regulation did not fully satisfy the "no more restrictive criteria" requirement of Section 402(f)(2). This argument could have been raised on administrative and ultimately judicial review of the post-1978 denials of those claims. And nothing in Section 435(b) suggests that Congress intended to exclude those claims from the provisions governing available administrative and judicial review. To the contrary, Congress intended such review to be available to "all claims certified, referred, or otherwise subject to review by the Secretary of Labor." H.R. Conf. Rep. 95-864, *supra,* at 23. In addition, as we stated in our opening brief (at 34), the statute sets *jurisdictional* time limits for claimants to seek review of decisions denying benefits.[8]

[8] See, e.g., *Danko* v. *Director, Office of Workers' Compensation Programs,* 846 F.2d 366 (6th Cir. 1988); *Butcher* v. *Big Mountain Coal, Inc.,* 802 F.2d 1506 (4th Cir. 1986); *Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs,* 798 F.2d 215, 217 (7th Cir. 1986); *Clay* v. *Director, Office of Workers' Compensation Programs,* 748 F.2d 501, 503 (8th Cir. 1984); *Insurance Co. of North America* v. *Gee,* 702 F.2d 411 (2d Cir. 1983); but see *Brown* v. *Director, Office of Workers' Compensation Programs,* No. 87-7358 (11th Cir. Aug. 15, 1988).

Respondents have failed to justify the invocation of mandamus to compel the reopening of cases which the Secretary has already considered once pursuant to the automatic review requirement of Section 435(b). Even if one were to accept the argument (Sebben Br. 48-49) that a doubtful duty (such as the alleged duty under Section 402(f)(2) to allow claimants with fewer than ten years of coal mine experience to invoke the presumption of entitlement to benefits) may become sufficiently clear after a court construes a statute to justify mandamus relief (Br. 48-49), the Sebben respondents have neglected to explain how any provision in the Black Lung Benefits Act calls for any further reopening of claims that were finally denied after review under the 1978 amendments. Since nothing in the Act even arguably requires the Secretary to reopen yet again such claims which have not been pressed on administrative review, mandamus is plainly not warranted.[9]

[9] Even if one concluded, as we do not, that claimants had a "collateral" right to an automatic review of their claims under respondents' standard for invoking the presumption of entitlement to benefits (Sebben Br. 40-41), such a right would not excuse their failure to press that issue until long after their cases were closed. The primary relevance of such a conclusion would be that earlier—not later—review of the issue might be justified. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976) (plaintiff sought to go directly to court to expedite resolution of his claim).

In this case, recognition of a collateral right to automatic review under respondents' standard might have justified a petition to the Benefits Review Board—even before final consideration of their claims by an administrative law judge—to press for consideration of their claimed right to consideration under their standard. The Board recognizes the collateral order doctrine (*Morgan* v. *Director, Office of Workers' Compensation Programs*, 8 B.L.R. 1-491, 1-493 (Ben. Rev. Bd. 1986); *Holmes & Narver, Inc.* v. *Christian*, 1 B.R.B.S. 85, 88 (Ben. Rev. Bd. 1974)). Having failed to raise the issue either early or following denial of their claims, respondents certainly cannot invoke the collateral order doctrine to justify a right of review to be asserted whenever they please.



The Sebben respondents rely heavily on *Bowen* v. *City of New York*, 476 U.S. 467 (1986). In the process, they ignore the distinction between the concealed application of an illegal requirement to screen out claimants (as in *Bowen*) and the open and public application of a standard alleged to be incorrect.[10] The exhaustion requirement was waived in *Bowen* not because the agency applied the incorrect standard, but because it concealed from claimants, and thus prevented them from challenging in a focused way, the illegal hurdle it was placing before them (*id.* at 484-485). The administrative review process exists to allow for the correction of errors, and administrative autonomy justifies an exhaustion requirement so that the agency may have a chance to discover and correct its own errors. *McKart* v. *United States*, 395 U.S. 185, 195 (1969). Absent the sort of impairment of the review process identified in *Bowen*, there is no basis for a court to permit circumvention of a statutorily-mandated scheme of review.

Finally, the Sebben respondents present no reason not to invoke res judicata. They do not dispute that black lung adjudications resemble adversary court proceedings, which, as we stated in our opening brief (at 36), leads to the conclusion that their claims are barred. Respondents' sole discussion of res judicata (Sebben Br. 44-45) states that it does not apply because there has been no ruling on their asserted right to automatic review. But res judicata, of course, bars relitigation of issues that could have been raised in prior proceedings, whether or not they actually were raised. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); 1B J. Moore, *Moore's Federal Practice* ¶ 0.405[3], at 190-193 (1988). Accordingly, the Eighth Circuit erred in ordering the Secretary of Labor to

[10] This case is also distinguishable from *Bowen* by the jurisdictional nature of the time limits under the Black Lung Benefits Act.

reopen claims that had been finally denied.[11]

## CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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AUGUST 1988

[11] As noted in our opening brief (at 38), the reopening effort mandated by the Eighth Circuit would place an enormous strain on the black lung benefits adjudicatory system. The Sebben respondents' prediction that initial reviews can be conducted quite expeditiously (Br. 46 n.87) is based on the Labor Department's performance in the wake of the 1978 amendments when Congress, after ordering reopening of numerous claims, appropriated funds for 564 new staff positions, 453 of which were four-year appointments. See Secretary of Labor, *Annual Report to Congress on the Black Lung Program* 6 (1977).

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